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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1466

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Petitioner,

vs.

CARL RAY SONGER.

On Petition For A Writ Of Certiorari Before Judgment To The United States Court Of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether A Court Of Appeals Is Justified In Staying Execution Of A Death Sentence Where The State Trial Court Makes A Presumptively Correct Finding Of Fact That A Violation Of Lockett v. Ohio, 438 U.S. 586 (1978) Occurred, The Federal District Court Grants A Certificate Of Probable Cause, And The Court Of Appeals Grants A Hearing On The Merits Of The Claims En Banc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
CITATION TO OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Statement of Facts	4
B. Course of Proceedings Since Trial	7
REASONS FOR DENYING THE WRIT	13
The Court Should Decline To Take The Extraordinary Step Of Granting Certiorari Before Judgment In The Court of Appeals Solely To Reconsider Its Prior Order Refusing To Vacate A Stay Of Execution, Especially When Subsequent Developments Confirm The Court's Prior Determination That The Court Of Appeals Did Not Abuse Its Discretion	
CONCLUSION	20
APPENDICES	
Appendix A: Songer v. Wainwright, No. 85-3064 (11th Cir. Mar. 20, 1985) (en banc)	
Appendix B: Songer v. Wainwright, No. 83-3500 (11th Cir. Apr. 9, 1985) (en banc)	

TABLE OF AUTHORITIES

Case	Page
Adams v. Wainwright, 734 F.2d 511 (11th Cir. 1984)	17,18
Barefoot v. Estelle, ____ U. S. ____, 77 L.Ed.2d 1090 (1983)	11,16
Dames & Moore v. Regan, 453 U.S. 654 (1981)	19
Eddings v. Oklahoma, 455 U.S. 104 (1982)	5,8,9 13,14,19
Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984)	17,18
Gardner v. Florida, 430 U.S. 349 (1977)	7
Henry v. Wainwright, 743 F.2d 761 (11th Cir. 1984)	17
Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984), vacated and reh'g en banc granted, No. 83-3578 (11th Cir. Jan. 8, 1985)	passim
Kemp v. Smith, ____ U.S. ____, 77 L.Ed.2d 1424 (Powell, Circuit Justice 1983)	18
Kemp v. Smith, ____ U.S. ____, 77 L.Ed.2d 1446 (Powell, Circuit Justice 1983)	18
Lockett v. Ohio, 438 U.S. 586 (1978)	passim
Sanders v. United States, 373 U.S. 1 (1963)	15
Smith v. Kemp, 715 F.2d 1459 (11th Cir. 1983)	18
Songer v. Florida, 430 U.S. 952 (1977)	7
Songer v. Florida, No. 66,472 (Fla. Jan. 31, 1985)	10
Songer v. Florida, No. 84-6166 (U.S. filed Feb. 1, 1985)	4
Songer v. State, 322 So.2d 481 (Fla. 1975)	7
Songer v. State, 365 So.2d 696, reh'g denied, 365 So.2d 700 (Fla. 1978)	8
Songer v. State, 419 So.2d 1044 (Fla. 1982)	8
Songer v. State, 423 So.2d 355 (Fla. 1982)	8
Songer v. Wainwright, 571 F. Supp. 1384 (M.D. Fla. 1983)	8
Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984), vacated and reh'g en banc granted, No. 83-3500 (11th Cir. Apr, 9, 1985)	2,9,12

Case	Page
Songer v. Wainwright, ____ U.S. ____, 53 U.S.L.W. 3480 (Jan. 7, 1985)	9
Songer v. Wainwright, No. 85-14-Civ-Oc-12 M.D. Feb. 2, 1985)	11
Songer v. Wainwright, No. 85-3064 (11th Cir. 1985)	2,12,16
Spencer v. Zant, 715 F.2d 1562, vacated for reh'g en banc, 715 F.2d 1583 (11th Cir. 1983)	17,18
State v. Songer, No. 74-49 CF (Fla. Cir. Ct. Jan. 27, 1985)	4,10
United States v. Nixon, 418 U.S. 683 (1974)	19
United States v. Thomas, 361 U.S. 950 (1960) (per curiam)	19
United States v. United Mine Workers, 330 U.S. 258 (1947)	19
Wainwright v. Adams, ____ U.S. ____, 80 L.Ed.2d 809 (1984)	16,17,18
Wainwright v. Ford, ____ U.S. ____, 82 L.Ed.2d 911 (1984)	16,17,18
Wainwright v. Songer, No. A-603 (U.S. Feb. 5, 1985)	12,16
Washington v. Wainwright, 737 F.2d 922 (11th Cir. 1984)	17
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	19

Statutes and Rules

28 U.S.C. § 1254(1)	3
28 U.S.C. § 2101(e)	3
28 U.S.C. § 2244(a)	15
28 U.S.C. § 2253	15
28 U.S.C. § 2254, R.9	10,15
11th Cir. R. 30	11

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RESPONDENT'S BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent, Carl Ray Songer, has challenged the constitutionality of his death sentence in habeas corpus proceedings. His case is currently pending before the court of appeals en banc; briefs have not yet been filed, but are due soon. In order to permit orderly consideration of the merits, the court stayed the execution of respondent's death sentence. Despite the pendency of the merits before en banc court of appeals, the State of Florida seeks certiorari review of the narrow question whether the granting of a stay in this case was justified. Respondent urges the Court to deny the State's petition.

CITATION TO OPINION BELOW

The February 5, 1985 order of the United States Court of Appeals for the Eleventh Circuit, staying respondent's execution, is the basis of the State's petition. Songer v. Wainwright, No. 85-3064 (11th Cir. Feb. 5, 1985). It is not yet reported, but is appended to the petition at Appendix A1. Since the filing of the petition, two additional orders have issued from the court of appeals. Both are of enormous significance to the question now before the Court.

On March 20, 1985, the court of appeals ordered review en banc of the merits of respondent's second habeas corpus appeal in conjunction with a substantively related case.[1] The order of the en banc court, Songer v. Wainwright, No. 85-3064 (11th Cir. Mar. 20, 1985) (en banc), is not yet reported. A copy is attached to this brief as Appendix A.

On April 9, 1985, the court of appeals withdrew its opinion and order on the original habeas appeal, ordered that appeal reconsidered en banc, and consolidated it with the merits of the second habeas appeal. Songer v. Wainwright, No. 83-3500 (11th Cir. Apr. 9, 1985) (en banc), vacating 733 F.2d 788 (11th Cir. 1984). That order is also not yet reported, but is attached as Appendix B.[2]

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[1] Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984), vacated and reh'g en banc granted, No. 83-3578 (11th Cir. Jan. 8, 1985).

[2] The pendency of the proceedings below means that other relevant orders may issue while the State's petition is pending in this Court. As a courtesy to the Court, respondent will forward these as they become available.

JURISDICTION

The jurisdiction of the Court to grant certiorari to review a case before judgment has been reached in the court of appeals in invoked under 28 U.S.C. §§ 1254(1), 2101(e). As will be more fully discussed below, the Court has reserved that discretion for rare occasions.

CONSTITUTIONAL PROVISIONS INVOLVED

With due respect to the State, the petition involves no constitutional provision. Rather, the petition presents nothing more than a complaint about internal appellate court administration in an isolated case.

STATEMENT OF THE CASE

Since the State presents a largely "procedural" question, its statement of the case consists primarily of a recitation of the various citations to decisions rendered in this case over the course of its long and tedious procedural history. Respondent believes, however, that some description of the substance of those decisions and the situation which they concern would be useful to the Court in assessing whether the court of appeals correctly invoked its discretion to stay respondent's execution to enable that court to review with care the constitutional issue presented. Therefore, believing it is not repetitive, respondent offers the following:

A. Statement of Facts

Respondent, Carl Ray Songer, was convicted and sentenced to death for the murder of Ronald Smith, a Florida Highway Patrolman. The constitutionality of his penalty trial is the sole subject of his second habeas corpus petition, and the facts involved are not in dispute.

Florida had enacted a death sentencing statute shortly before respondent was tried in 1974. That statute specifically identified the aggravating and mitigating factors that the sentencer was permitted to consider. See State v. Songer, No. 74-49 CF (Fla. Cir. Ct. Jan. 27, 1985) (appendix reproduces former statute).[3] Respondent's was the first capital sentencing trial to occur under the new law in Florida's Ninth and Fifth Judicial Circuits. It was the first experience with such bifurcated proceedings for defense counsel, the prosecutors and the trial judge.

As a result of his study of the statute and discussions with the trial court and the State, defense counsel concluded that his presentation of mitigating evidence was limited to that relevant to those factors enumerated in the statute. Consequently, defense counsel decided not to develop substantial, available mitigating evidence in the form of good-character testimony from respondent's parents, former teachers, clergy, employers and

[3] The citation is to the trial court's order on respondent's second state court motion for post-conviction relief. It was in this order that the trial court in essense found as a factual matter that respondent's sentencing trial had been unconstitutionally narrow, but denied relief on the legal ground that Lockett v. Ohio, 438 U.S. 586 (1978), did not apply retroactively to trials occurring before the date Lockett was decided. See State v. Songer, slip op. at 6. Respondent filed a petition for certiorari upon affirmance of that decision by the Florida Supreme Court, see Songer v. Florida, No. 84-6166 (U.S. filed Feb. 1, 1985); a decision from the Court on the petition is pending. The trial court's January 27 order is the only one of the many decisions in this case not cited by the State; it is reproduced in its appendix, however, at Appendix A49.

friends. Nor did counsel investigate or present an existing Texas parole report which described respondent's temperament as nonviolent, even passive, and his prospects for rehabilitation as excellent. Even the nonstatutory factors which inadvertently found their way into the record -- for example, information that respondent was married with a young son, that he was a brick-mason, that he was hoping to settle his family in Florida --were unaddressed: defense counsel waived closing argument, as did the prosecutor. The entire penalty phase -- the sum total of time during which the jury was called upon to focus its attention on the respondent as an individual in advance of deciding whether he should live or die -- lasted about a half hour. The reading of the court's instructions took about 2 minutes.

The court's instructions were less than thirteen lines long.[4] The court instructed the jury that a decision to vote for life must be "based upon ... whether sufficient mitigating circumstance exist, as hereinafter enumerated." The court then

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[4] The trial court's sentencing instructions, in their entirety, were as follows:

> Under these procedures, it is now your duty to determine, by majority vote, whether or not you advise the imposition of the death penalty based upon:
>
> One, whether sufficient aggravating circumstances as hereinafter enumerated, exist.
>
> Two, whether sufficient mitigating circumstances exist, as hereinafter enumerated, which outweigh the aggravating circumstances found to exist, and
>
> Three, based on these considerations, whether the defendant should be sentenced to life or death.

These instructions did not use the precise language of the statute. The statute was changed after Lockett expressly to allow all mitigating circumstances into evidence. Now, of course, Florida practice is to use standard jury selections, which are some five or six pages long. Those instructions make explicit the demands of Lockett and Eddings v. Oklahoma, 455 U.S. 104 (1982).

told the jury that "mitigating circumstances by statute are" those listed in the statute, whereupon the trial court recited the statutory list. Even the verdict form on which the jury was required to indicate its decision emphasized the limitations on the jury's consideration of sentence: the form stated that the jury had considered only "mitigating circumstances as defined in the Court's charge." At no point did the court advise the jury that it could give weight and meaning to its impressions of the character and background of the respondent, and that ultimately its decision was whether a death sentence, considering the totality of the circumstances, was appropriate.

At respondent's second, Florida post-conviction hearing, the trial court itself acknowledged that the sentencing instructions were limiting: "Well, I think the instructions as given did prohibit it [the jury] to just those mitigating circumstances that were in the statute and read." The court also explained why it deemed that limitation appropriate in 1974:

> [W]hen the law was first passed it was strictly limited to the statutory circumstances which were spelled out, and did not include certain items which have since been included by the statute. At that time ... it was restricted to just certain enumerated items.

Thus, evidence is before the appellate court for the first time that the trial court's admitted intent at respondent's sentencing trial was to preclude the jury from considering any other aspects of the man before them than those few specifically noted in the statute. Moreover, the trial court, which is the ultimate sentencer in Florida, limited its own consideration of sentence to a mechanical weighing of statutory factors; that is what the court believed the statute required.

In January of this year, evidence was discovered which proved the prejudice ordinarily presumed from a Lockett/Eddings violation. A juror who served at respondent's sentencing trial has come forward to say that the jury struggled over its sentencing decision and ultimately voted to recommend death only because it felt constrained to do so by the court's charge, and because it placed its collective oath above its collective instinct. Moreover, the juror testified at the second state court post-conviction hearing that, had the court instructed that the jury could go beyond the factors listed in the statute, the nonstatutory mitigating evidence now known would have produced a recommendation for life.

B. Course of Proceedings Since Trial

Respondent's original sentence was affirmed by the Supreme Court of Florida on September 22, 1975. Songer v. State, 322 So.2d 481 (Fla. 1975) ("relating the statutorily enumerated mitigating circumstances to the instant case") (emphasis added). No petition for rehearing was filed. This Court granted a petition for certiorari, vacated the sentence, and remanded for resentencing in accordance with Gardner v. Florida, 430 U.S. 349 (1977). Songer v. Florida, 430 U.S. 952 (1977).

At the resentencing hearing, defense counsel moved to impanel a new jury. He also requested a new Pre-Sentencing Investigation (PSI) report to include information about respondent's background and character, since the prior PSI had been limited to that about his prior criminal record. Respondent himself moved pro se to present character evidence. The trial court denied the motions, and immediately handed counsel an order, prepared in advance of the hearing, reimposing the death sentence on grounds identical to those originally relied upon.

On September 7, 1978, the death sentence was again affirmed in the Florida high court. Songer v. State, 365 So.2d 696 (Fla. 1978). Rehearing was denied with an opinion on December 21, 1978. It was in that opinion that the Florida Supreme Court first addressed the implications of Lockett v. Ohio, 438 U.S. 586 (1978), which had been decided while respondent's appeal was sub judice. However, the court overlooked the significance of Lockett to respondent's case, holding that the statute was on its face constitutionally sound, but saying nothing about what standard was actually applied when respondent was tried. Songer v. State, 365 So.2d 700 (Fla. 1978).

On September 24, 1980, respondent filed a Motion to Vacate Judgment and Sentence, pursuant to Fla. R. Crim. P. 3.850, raising several claims as violations of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. On September 30, 1980, after a limited evidentiary hearing, the trial court denied the motion. The Florida Supreme Court affirmed on September 9, 1982. Songer v. State, 419 So.2d 1044 (Fla. 1982). Rehearing was denied on October 29, 1982.

A state petition for writ of habeas corpus alleging ineffectiveness of appellate counsel was filed in the Florida Supreme Court on November 22, 1982 and denied on December 1, 1982. Songer v. State, 423 So.2d 355 (Fla. 1982).

Repondent first came to the federal courts on December 1, 1982, with a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida, Ocala Division. After an evidentiary hearing, the district court denied the petition on July 14, 1983. Songer v. Wainwright, 571 F. Supp. 1384 (M.D. Fla. 1983) (Melton, J.). The district court dealt with respondent's Lockett/Eddings claim as part of its effective assistance of counsel analysis, acknowledging that counsel's failure to introduce nonstatutory mitigating evidence

was the product of a reasonable mistake. Id. at 1395. Having established that trial counsel was not at fault, however, the court was silent on the continuing significance of Lockett. The district court did not then address the fact, regardless of the matter of fault, that respondent simply did not have a sentencing hearing of the scope contemplated by the Eighth Amendment. On appeal from the denial of habeas, the court of appeals affirmed on May 18, 1984. Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984). The panel did not address the Lockett/Eddings issue. Rehearing and rehearing en banc were denied on June 26, 1984.

Respondent then sought review in this Court by petition for writ of certiorari. The Court denied the petition on January 7, 1985, with a lengthy dissenting opinion by Justices Brennan and Marshall. Songer v. Wainwright, ____ U.S. ____, 53 U.S.L.W. 3480 (Jan. 7, 1985). That dissent represents the first time in the long history of this litigation that any judge had squarely addressed the implications under Lockett and Eddings of respondent's sentencing trial in view of the fact that all of the participants operated under the assumption that evidence of respondent's character and background could not and would not be admitted in mitigation of a death sentence.

Only a few days after this Court denied respondent's petition for certiorari, the court of appeals ordered rehearing en banc in Hitchcock v. Wainwright, No. 83-3578 (11th Cir. Jan. 11, 1984), vacating 745 F.2d 1332 (11th Cir. 1984). On the understanding that the court would deal in Hitchcock with the applicability of Lockett and Eddings to a set of similar circumstances, respondent filed a motion in the court of appeals to recall its mandate pending Hitchcock. The motion was denied on January 29, 1985. Songer v. Wainwright, No. 83-3500 (11th Cir. Jan. 29, 1985). Panel rehearing was denied on February 1, 1985,

with an amendment to the prior order. The en banc court of appeals vacated that decision four days later. Songer v. Wainwright, No. 83-3500 (11th Cir. Feb. 5, 1985) (en banc).

Meanwhile, on January 24, 1985, respondent filed a second motion to vacate sentence in the trial court. After a hearing on January 25, the trial court entered an order on January 27, implicitly finding that nonstatutory mitigating evidence had been precluded from respondent's sentencing hearing because of a narrow understanding and application of Florida's sentencing statute by every participant at the trial. State v. Songer, No. 74-49 CF, slip. op. at 5-6. But the court denied relief on the sole legal ground that Lockett does not apply retroactively. Id. The Florida Supreme Court affirmed the denial of relief on January 31, 1985. A petition for certiorari on the question whether Lockett v. Ohio is retroactive was filed on the same day, and is pending in this Court. Songer v. Florida, No. 66, 472 (Fla. Jan. 31, 1985), petition for cert. filed, ____ U.S.L.W. ____ (U.S. Jan. 31, 1985) (No. 84-6166).

Also on January 31, 1985, unable because of the impending execution to risk awaiting the decision of this Court and of the court of appeals en banc, respondent brought his claims to the federal district court in a second petition for writ of habeas corpus. The court heard oral argument on February 1, at which petitioner and respondent argued their positions with respect to the court's discretion to redetermine the merits of the successive petition. See Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts. The parties stipulated to the admission in evidence of the transcript of the January 25, 1985 trial court hearing.[5]

[5] Respondent would note that the facts adduced at that hearing are uncontroverted. The State waived cross-examination of every witness and offered no evidence in rebuttal whatsoever.

In an order entered on February 2, 1985, the district court dismissed the petition on the ground that "the ends of justice would not be served by a redetermination of the issues raised." Songer v. Wainwright, No. 85-14-Civ-Oc-12, slip op. at 13 (M.D. Fla. Feb. 2, 1985) (Melton, J.). The district court concluded that respondent's case was not adequately similar to one of three examples from Supreme Court and Eleventh Circuit cases where redetermination of constitutional issues had been deemed to serve the ends of justice. Slip op. at 7-13.

Respondent immediately appealed. Oral argument was scheduled for Monday, February 4, less than twenty-four hours before the scheduled execution.[6] Since the district court had issued a certificate of probable cause, the court of appeals was bound to reach the merits of respondent's claims. Barefoot v. Estelle, ____ U.S. ____, 77 L.Ed.2d 1090, 1104 (1983). To assist it in doing so, the court stayed the execution for twenty-four hours, until the morning of February 6, or until further order of the court. On February 5, the panel expressed its view that the merits of respondent's claims "should be heard by the court en banc along with Hitchcock v. Wainwright," the case the court had

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[6] The State makes special note of the fact that oral-argument was held before a different panel than that which considered the first appeal, despite a recently-enacted circuit rule which states that "[t]he panel to which the case is assigned shall handle all matters pertaining to ... second or successive petitions," 11th Cir. R. 30(a)(4). See Petition for Certiorari at 14. The State goes on to upbraid the court of appeals for purportedly failing to "follow its own rules" and encouraging capital litigation until the death-sentenced individual "reaches a sympathetic ear." Id. at 22. However, the State unfairly impugns the integrity of the court below. Shortly before oral argument in Atlanta, the clerk explained to counsel for respondent that the court's internal policy was not to apply Rule 30 to cases brought to the court before its enactment; respondent's first petition was decided before enactment of the rule. One might also surmise that, because of the nature of the emergency, it was simply more practical to convene a panel largely resident in Atlanta rather than in other distant states in the circuit. As the Court must surely appreciate, the State's assertions distill once again to mere complaints about the way the court of appeals dealt internally with this particular emergency.

earlier ordered reheard en banc and that respondent had all along maintained was closely related. Songer v. Wainwright, No. 85-3064, slip op. at 2 (11th Cir. Feb. 5, 1985). The court explained that:

> In general we are not able to predict the exact contours of any en banc decision that may be rendered in Hitchcock on the Lockett issue in the case, and the extent, if any, to which this issue might affect this case. Nor can we, as a panel of the court, properly attempt to decide or limit what the court may decide in Hitchcock. Without knowing the parameters of Hitchcock, we cannot say with assurance what, if any, issues in this case may fall outside of Hitchcock.

Id. at 3. The court granted a stay until the full court could vote whether to hear this case with Hitchcock. This Court denied the State's application to vacate the lower court's stay. Wainwright v. Songer, No. A-603 (U.S. Feb. 5, 1985). The State essentially seeks the Court's reconsideration of that action by means of the instant petition.

As noted earlier, judgment on the merits is pending in the court of appeals en banc. After the State filed the instant petition, the court of appeals voted to hear respondent's appeal en banc with Hitchcock. Songer v. Wainwright, No. 85-3064 (11th Cir. Mar. 20, 1985) (en banc). On April 9, 1985, further demonstrating the importance with which the court of appeals views respondent's case, the en banc court vacated its opinion and judgment on the original appeal and consolidated that appeal for rehearing en banc with the second appeal. Songer v. Wainwright, No. 83-3500 (11th Cir. Apr. 9, 1985) (en banc), vacating 733 F.2d 788 (11th Cir. 1984).

REASONS FOR DENYING THE WRIT

THE COURT SHOULD DECLINE TO TAKE THE EXTRAORDINARY STEP OF GRANTING CERTIOARI BEFORE JUDGMENT IN THE COURT OF APPEALS SOLELY TO RECONSIDER ITS PRIOR ORDER REFUSING TO VACATE A STAY OF EXECUTION, ESPECIALLY WHEN SUBSEQUENT DEVELOPMENTS CONFIRM THE COURT'S PRIOR DETERMINATION THAT THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION

The State seeks the extraordinary step of review in this Court before judgment on the merits in the court below because, in essence, it believes that the court of appeals was unjustified in staying respondent's execution in January. But this Court has already refused to vacate that stay. The wisdom of the Court's prior ruling is surely confirmed by the subsequent decisions of the court of appeals to consider respondent's issues en banc and to rehear en banc the original appeal. Quite unlike the arbitrariness or randomness with which the State alleges the court to have ordered this stay, the court's actions demonstrate the importance the court of appeals attaches to this case and the profound respect it has for the constitutional demands placed on capital trials by this Court in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). The lower court's decision to consider the Lockett/Eddings question en banc should alone belie the State's assertions of abuse of discretion in granting the stay.

Even putting the recent orders to one side, the State's complaints are unwarranted. At the time respondent's second appeal and stay application were before the court below, the court had recently ordered rehearing en banc of Hitchcock v. Wainwright, No. 83-3578 (11th Cir. Jan. 11, 1985) (en banc), vacating 745 F.2d 1332 (11th Cir. 1984). The issue presented in Hitchcock, as interpreted by the panel, was "whether [Hitchcock] was denied a fair and individualized capital sentencing determination by the preclusion of nonstatutory mitigating factors as a

result of either the operation of state law or the denial of effective assistance of counsel because of counsel's belief that Florida law barred such evidence." 745 F.2d at 1334-35.[7] It is incontrovertible that respondent's sentencing hearing was not of the scope required by Lockett and Eddings. It is equally clear that the limited scope was produced by an unconstitutionally narrow understanding and application of the Florida sentencing statute by the trial judge and counsel. The only basis for distinguishing the two cases is that in Hitchcock, defense counsel formed his mistaken understanding after reading a Florida decision, Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976), while respondent's trial attorney formed his mistaken understanding after reading the then-new statute and talking over how to proceed with the judge and the prosecutor. Because the panel below thought this distinction might prove to be of no constitutional significance, it stayed respondent's execution and called for en banc consideration of respondent's case with Hitchcock. Considered in context, the court's disposition of the matter of a stay was perfectly sensible.

The State nevertheless objects. In principle part, its ground for complaint is that a stay in a successive habeas appeal pending en banc disposition of a similar claim in a different

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[7] Hitchcock's Suggestion for Rehearing En Banc stated the issue similarly:

> Whether the preclusion from a capital sentencing trial, held before Lockett v. Ohio was decided, of nonstatutory mitigating factors operated to deny the petitioner a full, fair and individualized sentencing determination when the preclusion was the result of the reasonable judgments of defense counsel, the trial court and the jury that the Florida death sentencing statute then in effect precluded the investigation, presentation and consideration of such evidence.

Suggestion for Rehearing En Banc at 2, Hitchcock v. Wainwright, No. 83-3578.

case compromises the doctrines of successive petitions and "finality." The State cites cases to suggest that this Court has disapproved of such actions before. Both the premise and the proposed authority, however, are wrongly advanced.

Congress itself has recognized that state prisoners have a right to bring to the federal courts, in certain circumstances, issues arising under the federal Constitution which challenge the integrity of a state court judgment. 28 U.S.C. §§ 2244(a), 2254. Section 2244(a), Rule 9(b) of the Rules Governing Section 2254 Cases In The United States District Courts, and the Advisory Committee Notes explaining the rule plainly contemplate that state prisoners will sometimes be able to relitigate their cases in the federal courts, even where the same issues are presented again. On the wisdom of Sanders v. United States, 373 U.S. 1, 15 (1963), Rule 9 permits a federal court to revisit issues previously resolved on the merits if doing so would serve the ends of justice. New, specific and presumptively correct state court fact findings show that respondent presents that "rare instance," Rule 9(b) advisory committee note, where reconsideration of a claim would serve the ends of justice. This is precisely the approach taken by the district court and the panel below in this case. And it is fully authorized by law.

Moreover, the State overlooks the significance of the district court's decision to grant a certificate of probable cause. 28 U.S.C. § 2253. As this Court has stated:

> When a certificate of probable cause is issued by the district court, ... petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal. Accordingly, a circuit court, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of the appeal....

Barefoot v. Estelle, ___ U.S. ___, 77 L.Ed.2d 1090, 1104 (1983) (emphasis supplied). Even where a successive petition is involved, a stay is sometimes appropriate; if "exigencies of time preclude a considered decision on the merits, ... the motion for a stay must be granted." Id. at 1104 (emphasis added). The panel below fully understood the demands placed upon it by the certificate of probable cause to reach and resolve the merits of respondent's appeal. It also appreciated the problems in doing so while similar issues are pending and unresolved before the court en banc. In deciding to stay the execution, the panel explained that the pendency of Hitchcock en banc simply made prior, summary disposition of the merits of respondent's case imprudent. See Songer v. Wainwright, No. 85-3064, slip op. at 3 (11th Cir. Feb. 5, 1985). The decision to rehear en banc in Hitchcock issues also presented in respondent's case amply demonstrates that "[t]he granting of a stay ... reflect[ed] the presence of substantial grounds upon which relief might be granted." Barefoot v. Estelle, 77 L.Ed.2d at 1105.[8]

The State cites Wainwright v. Adams, ___ U.S. ___, 80 L.Ed.2d 809 (1984) and Wainwright v. Ford, ___ U.S. ___, 82 L.Ed.2d 911 (1984) as expressions of this Court's purported view "that the pendency of a case en banc on the same issue is not sufficient reason to enter a stay." Petition for Certiorari at 21, Wainwright v. Songer. Adams and Ford simply cannot be read so broadly.

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[8] In view of the fact that "this Court generally places considerable weight on the decision [on granting a stay] reacned by the circuit courts," and that the Court denied the State's eleventh hour application to vacate the lower court's stay order, Wainwright v. Songer, No. A-603 (U.S. Feb. 5, 1985), the State's petition can only be seen as an attempt to reopen a matter already resolved by this Court.

In Adams, the court of appeals was presented with statistical proof of race discrimination in the administration of Florida's death sentence. The en banc court then had before it another case involving a similar claim based on different proof from a different state, Georgia. Spencer v. Zant, 715 F.2d 1562, vacated for reh'g en banc, 715 F.2d 1583 (11th Cir. 1983). The appellate panel nevertheless granted a stay of Adams' execution "pending en banc resolution of Spencer," Adams v. Wainwright, 734 F.2d 511, 513 (11th Cir. 1984); but this Court, without opinion, vacated the stay order. 80 L.Ed.2d 809. Similarly, when another Florida prisoner sought and obtained a stay from the court of appeals in part because of the pending resolution of Spencer, Ford v. Strickland, 734 F.2d 538, 543 (11th Cir. 1984), three justices of this Court critized the lower court's decision. Wainwright v. Ford, 82 L.Ed.2d at 912 (Powell, J., joined by White & Blackmun, JJ., concurring). However, neither case suggests that the granting of a stay in the appellate court is always unwise when based on the pendency of a similar issue en banc.

Spencer dealt with a particular record built upon Georgia facts; the system under en banc scrutiny there was Georgia's. Adams and Ford, however, concerned only Florida patterns. While Adams and Ford may have involved similar questions, resolution of those questions in Spencer would not have effected Adams or Ford because the factual basis of their claims was different and, moreover, had already been discredited by the court. Indeed, Justices Powell, White and Blackmun offered this distinction as the basis for their criticism. Wainwright v. Ford, 82 L.Ed.2d at 912. This explains why the court of appeals, in cases cited by the State, thereafter refused the requests of Florida prisoners for stays pending Spencer. See Washington v. Wainwright, 737 F.2d 922 (11th Cir. 1984); Henry v. Wainwright, 743 F.2d 761

(11th Cir. 1984). By contrast, Songer presents the same issue as Hitchcock: it arises out of the same state, involves the same misapplication of the same law with the same unconstitutional result, and has its source in similar mistakes by trial counsel and others. The distinction made between Spencer and Adams or Ford does not characterize the relationship between Hitchcock and Songer.

Respondent's case was treated by the panel very like Smith v. Kemp, 715 F.2d 1459, 1461-62 (11th Cir. 1983). There, like here, the court of appeals granted a stay to enable it time to consider the merits of a second habeas corpus appeal. The State of Georgia twice attempted to have this Court vacate that stay, but on both occasions the Court refused. Justice Powell, in his capacity as circuit justice, expressed skepticism as to whether the issues presented were substantial enough to warrant a stay. Nevertheless, he denied Georgia's application: "the question before me is whether the Court of Appeals has abused its discretion in granting a temporary stay pending a hearing on the merits. I am not able so to conclude." Kemp v. Smith, ____ U.S. ___, 77 L.Ed.2d 1424, 1425 (Powell, Circuit Justice 1983). In denying the second application to vacate, he reiterated the view that "[t]he Court of Appeals is in a better position to determine ... how much time it needs adequately to consider his claims." Kemp v. Smith, ____ U.S. ____, 77 L.Ed.2d 1446, 1447 (Powell, Circuit Justice 1983). Here, all the court of appeals did was to afford itself time to deliberate upon the merits. Mindful of the relationship between this case and Hitchcock, it later deemed respondent's case important enough to be heard en banc with Hitchcock. Under the circumstances, the court of appeals can hardly be said to have abused its discretion.

The Court has granted certiorari before judgment in rare cases, and only when "the public importance of the issues presented and the need for their prompt resolution" demanded. United States v. Nixon, 418 U.S. 683, 687 (1974) (subpoena to President to produce Watergate tapes). See also Dames & Moore v. Regan, 453 U.S. 654 (1981) (Executive Order concerning Iranian hostage crisis); United States v. Thomas, 361 U.S. 950 (1960) (per curiam) (voting rights decision jeopardized Louisiana's imminent general election); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Executive Order seizing steel mills during Korean War); United States v. United Mine Workers, 330 U.S. 258 (1947) (national coal miner's strike). The decision of the court of appeals to stay a state prisoner's execution in these circumstances hardly compares.

The State implies that the granting of a stay in this case effectively enjoins execution of all death sentences imposed before the decision in Lockett. Presumably, this is the basis for the State's extraordinary petition for review before judgment in the court of appeals. But the State misrepresents the lower court's order. This is not a case where the court of appeals granted a stay upon the allegation of a merely colorable Lockett/Eddings claim. Respondent presents the strongest circumstances in support of a stay. The state court here found, on the basis of uncontroverted facts, that evidence of unenumerated mitigating factors was precluded from respondent's sentencing determination. Prejudice was proven, not presumed. The State cannot fairly deem the granting of this stay an abuse of discretion. It will not interfere with the proper execution of state court judgments. Accordingly, certiorari before judgment is not warranted.

CONCLUSION

This is an important case on the merits. In the fullness of time, this Court may be asked to give it plenary consideration. But the merits are not now before the Court. In the instant petition, the State seeks review of the court of appeals' interim decision to stay respondent's execution until the merits are resolved below. In view of the pendency of this case before the en banc court and the obvious seriousness with which it regards the merits, the court of appeals did not abuse its discretion in granting a stay of execution. Respondent respectfully requests, therefore, that the Court deny the State's petition for a writ of certiorari before judgment in the court of appeals.

Respectfully submitted,

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Dated: April 15, 1985.

APPENDIX A:

Songer v. Wainwright, No. 85-3064
(11th Cir. Mar. 20, 1985) (en banc)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAR 20 1985
Spencer D. Mercer
Clerk

No. 85-3064

CARL RAY SONGER,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,
RICHARD DUGGER, Superintendent,
Florida State Prison, Starke,
Florida,

Respondents-Appellees.

Appeal form the United States District Court for the
Middle District of Florida

(March 20, 1985)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges.*

BY THE COURT:

On the court's own motion, a majority of the judges in active service having voted in favor of hearing the captioned appeal en banc,

IT IS ORDERED that this case shall be heard by this court sitting en banc, with oral argument on a date hereafter to be fixed. The clerk will specify a briefing schedule for the filing of en banc briefs.

*Judge Hatchett is disqualified and did not participate in this decision.

APPENDIX B:

Songer v. Wainwright, No. 85-3500
(11th Cir. Apr. 9, 1985) (en banc)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
APR 9 1985
SPENCER D MERCER
CLERK

No. 83-3500

CARL RAY SONGER,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, etc., and
RICHARD L. DUGGER, etc.,

Respondents-Appellees.

- - - - - - - -

On Appeal from the United States District Court for the Middle District of Florida

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion May 15, 1984, 11th Cir., 1984, 733 F.2d 788;
Order of January 29, 1985, 11th Cir., 1985___F.2d___;)

(April 9, 1985)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges.*

B Y T H E C O U R T:

By order entered March 20, 1985 the court has ordered that No. 83-3064 (Songer II) be heard by the court en banc, with oral argument.

In 83-3500 (Songer I), a judge in regular active service has moved that the court en banc rehear the merits of the case, with oral argument, along with the en banc hearing on Songer II. A majority of the judges in regular active service have voted in favor of the motion.

It is ORDERED that 83-3500 (Songer I) shall be reheard by this court sitting en banc with oral argument, along with the hearing en banc in Songer II. The cases are consolidated for this purpose. The clerk will specify, and coordinate, briefing schedules for the filing of en banc briefs. The previous panel's opinion filed on May 18, 1984, and the order of the panel entered January 29, 1985 are VACATED.

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*Judge Joseph W. Hatchett is recused and did not participate in this decision.